

by the Commission. The covered entity shall have the burden of proof to establish that the proposed change in encoding rules for a new service is in the public interest. In making its determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from existing services offered by any covered entity within the applicable defined business model prior to December 31, 2002; and

(ii) The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(iii) A petition may, upon request of the petitioner, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition. A petitioner's request for the return of a petition will be regarded as a request for dismissal.

(d) *Complaint regarding a new service not subject to petition.* In an instance in which an interested party has a substantial basis to believe and does believe in good faith that a new service within a defined business model has been launched without a petition as required by this section, such party may file a complaint pursuant to § 76.7.

§ 76.1906 Encoding rules for undefined business models.

(a) Upon public notice and subject to requirements as set forth herein, a covered entity may launch a program service pursuant to an undefined business model. Subject to Commission review upon complaint, the covered entity may initially encode programs pursuant to such undefined business model without regard to limitations set forth in § 76.1904(b).

(1) *Notice.* Concurrent with the launch of an undefined business model by a covered entity, the covered entity shall issue a press release to the PR

Newswire so as to provide public notice of the undefined business model, and the proposed encoding terms. The notice shall provide a concise summary of the commercial audiovisual content to be provided pursuant to the undefined business model, and of the terms on which such content is to be available to consumers. Immediately upon request from a party entitled to be a complainant, the covered entity shall make available information that indicates the proposed encoding terms, including the use of copy never or copy one generation encoding, and the encoding of content with respect to "pause" as defined in § 76.1904(b)(2).

(2) *Complaint process.* Any interested party ("complainant") may file a complaint with the Commission objecting to application of encoding as set forth in the notice.

(i) *Pre-complaint resolution.* Prior to initiating a complaint with the Commission under this section, the complainant shall notify the covered entity that it may file a complaint under this section. The notice must be sufficiently detailed so that the covered entity can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of thirty (30) days from such notice before filing such complaint with the Commission. During this period the parties shall endeavor in good faith to resolve the issue(s) in dispute. If the parties fail to reach agreement within this 30 day period, complainant may initiate a complaint in accordance with the procedures set forth herein.

(ii) *Complaint.* Within two years of publication of a notice under paragraph (a)(1) of this section, a complainant may file a complaint with the Commission objecting to application of the encoding terms to the service at issue. Such complaint shall state with particularity the basis for objection to the encoding terms.

(A) The complaint shall contain the name and address of the complainant and the name and address of the covered entity.

(B) The complaint shall be accompanied by a certification of service on the named covered entity.

(C) The complaint shall set forth with specificity all information and arguments relied upon. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(D) The complaint shall set forth attempts made by the complainant to resolve its complaint pursuant to paragraph (a)(2)(i) of this section.

(iii) *Public notice.* The Commission shall give public notice of the filing of the complaint. Once the Commission has issued such public notice, any person otherwise entitled to be a complainant shall instead have the status of a person submitting comments under paragraph (a)(2)(iv) of this section rather than a complainant.

(iv) *Comments and reply.* (A) Any person may submit comments regarding the complaint within thirty (30) days after the date of public notice by the Commission. Comments shall be served on the complainant and the covered entity and on any persons listed in relevant certificates of service, and shall contain a detailed full statement of any facts or considerations relied on. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(B) The covered entity may file a response to the complaint and comments within twenty (20) days after the date that comments are due. Such response shall be served on all persons who have filed complaints or comments and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. Replies shall be due ten (10) days from the date for filing a response.

(v) *Basis for Commission determination as to encoding terms for an undefined business model.* In a permit-but-disclose proceeding, unless otherwise specified by the Commission, to determine whether encoding terms as noticed may be applied to an undefined business model, the covered entity shall have the burden of proof to establish that application of the encoding terms in the undefined business model is in

the public interest. In making any such determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from services offered by any covered entity prior to December 31, 2002;

(vi) *Determination procedures.* The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(b) *Complaint regarding a service not subject to notice.* In an instance in which an interested party has a substantial basis to believe and believes in good faith that a service pursuant to an undefined business model has been launched without requisite notice, such party may file a complaint pursuant to § 76.7.

§ 76.1907 Temporary bona fide trials.

The obligations and procedures as to encoding rules set forth in §§ 76.1904(b) and (c) and 76.1905(a) and (b) do not apply in the case of a temporary bona fide trial of a service.

§ 76.1908 Certain practices not prohibited.

Nothing in this subpart shall be construed as prohibiting a covered entity from:

(a) Encoding, storing or managing commercial audiovisual content within its distribution system or within a covered product under the control of a covered entity's commercially adopted access control method, provided that the outcome for the consumer from the application of the encoding rules set out in § 76.1904(a) and (b) is unchanged thereby when such commercial audiovisual content is released to consumer control, or

(b) Causing, with respect to a specific covered product, the output of content from such product in a format as necessary to match the display format of